Northeast Ohio District Council of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO *and* Ernest Alessio Construction Company, Inc. Case 8–CB–5733

April 6, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On March 28, 1990, Administrative Law Judge Marion C. Ladwig issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief in support of the judge's decision.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this decision.

I. INTRODUCTION

This case arises from an unfair labor practice charge filed by Ernest Alessio Construction Company, Inc. (Alessio) against the Northeast Ohio District Council of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Union) alleging that the Union violated Section 8(b)(3) of the Act by insisting to impasse on the inclusion in the parties' collective-bargaining agreement of an anti-dual-shop clause. An anti-dual-shop clause is a clause aimed at prohibiting or discouraging a unionized employer's maintenance of an affiliation with a nonunion company in a so-called double-breasting arrangement. Double-breasting is a corporate arrangement, found principally in the construction industry, in which a unionized employer forms, acquires, or maintains a separately managed nonunion company that performs work of the same type as that performed by the affiliated union company. The phenomenon has existed for more than 20 years, although the term ''double-breasting'' did not appear in the early Board decisions which found that such arrangements were lawful means of creating separate employers for union recognitional purposes and that certain types of union conduct aimed at imposing union representation on the employees of the separate nonunion company violated the Act.[1] Unions perceive such arrangements as inimical to the interests of the employees of the unionized companies that compete for work with the nonunion companies within the geographical area covered by the union agreement.[2] For the following reasons, we find, contrary to our dissenting colleague, that the anti-dual-shop clause at issue here is unlawful under Section 8(e) of the Act, and that the Union violated Section 8(b)(3) by insisting to impasse on it.

II. FACTUAL BACKGROUND

Alessio is a general contractor engaged in the construction industry in the Akron, Ohio area. Alessio's employees have been represented by the Union since the early 1960s. Although Alessio originally bargained as part of a multiemployer association, it withdrew from that association and commenced separate bargaining with the Union in the mid-1970s. Alessio and the Union subsequently entered into successive agreements patterned on the Union's master agreement with the multiemployer association. The last such agreement was effective from 1982 through 1985.

In 1984, the Union offered to make concessionary midterm modifications to its 1982–1985 Master Agreement in an effort to help signatory contractors compete with nonunion firms. These proposals involved two packages: an addendum to the Master Agreement and a Market Recovery Program (MRP). The addendum extended the Master Agreement to 1987 and eliminated scheduled wage increases. The MRP, on the other hand, would have amended the Master Agreement to allow employers to pay 80 percent of the contractual wage rate on private sector jobs, modified other economic provisions and work rules, and added an anti-dual-shop clause to the agreement's existing subcontracting clause.[3] The proposed anti-dual-shop clause stated:

> In the event that the partners, stock holders or beneficial owners of the company form or participate in the formation of another company which engages or will engage in the same or similar type of business enterprise in the jurisdiction of this Union and employs or will employ the same or similar classifications of employees covered by this Collective Bargaining Agreement, then that business enterprise shall be manned in accordance with the referral provisions herein and covered by all the terms of this contract.

Employers could agree to either the addendum or the MRP independently, or agree to both, as midterm modifications, or could reject both. In short, at this

[1] See, e.g., *Peter Kiewit Sons' Co.*, 206 NLRB 562 (1973), enf. denied 518 F.2d 1040 (D.C. Cir. 1975), revd. 425 U.S. 800 (1976); *Carpenters Local 213 (Baxter Construction)*, 201 NLRB 23, 26 fn. 7 (1973); *Gerace Construction*, 193 NLRB 645 (1971). See also *Carpenters Local 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 504–507 (5th Cir. 1982), cert. denied 464 U.S. 932 (1983).

[2] See *Carpenters Local 1478 v. Stevens*, 743 F.2d 1271, 1276 (9th Cir. 1984).

[3] The subcontracting clause in the 1982–1985 Master Agreement provided that ''[t]his Agreement shall bind all subcontractors while working for a contractor on the jobsite upon whom this Agreement is binding. Any contractor who sublets any of his work must sublet same, subject to this Agreement.'' The General Counsel does not allege that this clause is unlawful.

time the price for obtaining the reductions in pay and the more economical work rules was agreement to the anti-dual-shop clause; but the Union was not insisting on the clause as the price for any contract at all.

In 1984, Alessio advised the Union that it intended to abrogate the parties' agreement, which by its terms was effective until May 31, 1985. However, Alessio did not follow through on its threat. Subsequently, in 1985, Alessio advised the Union that it would not agree to either the addendum or the MRP as midterm modifications, but intended to implement the favorable concessionary aspects of the two proposals immediately. The Union responded by insisting that Alessio honor its contractual obligations absent mutual agreement on modifications to their 1982–1985 agreement. There is no allegation that Alessio thereafter failed to comply with the agreement.

Following the expiration of the 1982–1985 agreement, the parties commenced negotiations for a new agreement. The parties met and exchanged proposals on several occasions. On August 6, 1985, Alessio advised the Union that it would not agree to the Union's proposals regarding journeyman and apprentice wages, and would not agree to continue certain provisions of the expired contract that embodied mandatory subjects of bargaining, but there is no contention that Alessio refused to bargain on these subjects. Alessio also refused to agree to the proposed anti-dual-shop clause originally proposed as part of the MRP. According to the credited testimony, since August 21, 1985, the Union has demanded that Alessio agree to the anti-dual-shop clause as a condition of any agreement.

III. JUDGE'S CONCLUSIONS

The judge found that Alessio and the Union reached impasse over the inclusion of the proposed anti-dual-shop clause in any agreement. In this regard, the judge stated that Alessio had consistently asserted that it viewed the clause as unacceptable while the Union made it equally clear that agreement to the clause was a condition for agreeing to the wage concessions which Alessio sought. The judge also noted that the Union admitted, in a Motion for Summary Judgment submitted to the Board on January 15, 1987, that it has demanded agreement to the anti-double-breasting clause as a condition of consummating any collective-bargaining agreement.

The judge concluded, however, that the Union's insistence to impasse did not violate Section 8(b)(3) of the Act, because he deemed the anti-dual-shop clause a lawful mandatory subject of bargaining. He rejected the General Counsel's contention that the Union's insistence was unlawful because the clause itself was a proscribed secondary agreement within the meaning of Section 8(e) of the Act and was not saved from the prohibition by the construction industry proviso to Section 8(e). The judge construed the clause as applying only to entities to which a signatory employer ''diverted'' unit work, and he concluded that, as thus construed, the clause had lawful work preservation, i.e., primary, objectives. He further concluded that, even if the clause had a secondary objective, it was exempt from the prohibitions of Section 8(e) because he found that (1) it comes within the construction industry proviso, and (2) it is not subject to any enforcement mechanism of the sort proscribed with respect to secondary clauses that are lawful only by virtue of the proviso.[4]

IV. THE PARTIES' CONTENTIONS

The General Counsel contends that the anti-dual-shop clause has purely secondary objectives because it is directed at the labor relations of persons who are not bound to Alessio either as single employers or alter egos and because there is no evidence of diversion of work from the Alessio unit. In this regard, the General Counsel asserts that the judge erroneously relied on the Union business agent's testimony regarding the meaning of the clause to find, contrary to its plain and unambiguous language, that the clause would only apply in the event that the signatory diverted unit work to its nonunion affiliate.

The General Counsel further argues that this secondary clause is not saved by the construction industry proviso. He contends that, in light of its plain language and legislative history and precedents construing it, the proviso covers only contract clauses that in some way relate to the contracting or subcontracting of jobsite work or at least to the signatory employer's own performance of jobsite work under its contract. Congress intended the proviso to protect only contract clauses of that kind which were in existence in 1959, when the proviso was enacted, the General Counsel argues. He rejects—as inconsistent with basic tenets of statutory construction calling for a strict interpretation of exceptions to statutory prohibitions—any ''expansive and dynamic'' interpretation of the proviso aimed at bringing within it clauses that were not part of the pattern of contracting in 1959 because they were devised in response to later developments in the construction industry.

The clause at issue in this case, the General Counsel argues, goes beyond the proviso because it is unlike clauses that appeared in construction industry agreements in 1959 and earlier. It also goes beyond the proviso, the General Counsel maintains, because it does not come within the statutory language insofar as it would apply to work which had never been the subject of any contract or subcontract by the signatory employer, and to work which would be performed on

[4] See generally *Plumbers District Council 16 (Jamco Development)*, 277 NLRB 1281, 1282–1283 (1985).

jobsites where employees of the signatory employer would not be working.

The General Counsel further contends that the Respondent violated Section 8(b)(3) by insisting that Alessio agree to an illegal clause, i.e., the anti-dual-shop clause that, under the General Counsel's submission, violates Section 8(e). Even if the clause is found lawful, however, the General Counsel contends that it was a nonmandatory subject of bargaining, in that the clause does not concern the wages, hours and working conditions of unit employees. As such, it was not a subject on which the Respondent was entitled to bargain to impasse.

The Respondent does not appear to contend that the anti-dual-shop clause has primary objectives which render it lawful under Section 8(e). Rather, it contends that the judge correctly found that the clause was protected by the construction industry proviso. The Respondent notes that a union may strike to *obtain* an agreement protected by the proviso, and asserts that, a fortiori, it could lawfully bargain to impasse to obtain agreement over the clause. In support of its contentions, the Respondent cites to certain advice memoranda in which the General Counsel had previously stated that agreements like the anti-dual-shop clause were protected by the proviso, and to administrative law judge Marvin Roth's decision to that effect in *Painters District Council 51 (Manganaro Corp.),* Case 5–CC–1036 et al.[5]

V. ANALYSIS

An agreement is unlawful under Section 8(e) of the Act if (1) it is an agreement of a kind described in the basic prohibition of that section—e.g., an agreement to cease doing business with another person, (2) it has secondary, as opposed to primary, work preservation objectives, and (3) it is not saved by coming within the terms of the construction industry proviso to Section 8(e).[6] If a labor organization insists to impasse on a provision that is not a mandatory subject of bargaining either because it embodies a permissive subject or is unlawful, the party will be found to have violated Section 8(b)(3).[7] For the reasons that follow, we find that the clause at issue in this case comes within the basic 8(e) prohibition because it falls within the terms of that section and has secondary objectives, that it does not come within the construction industry proviso, and that the Respondent violated Section 8(b)(3) by insisting on it to impasse.

A. *The Basic 8(e) Prohibition*

We agree with the General Counsel that the proposed anti-double-breasting clause comes within the basic prohibition of Section 8(e), and we note that our dissenting colleague does not argue to the contrary.[8] It is an 8(e) clause because, by requiring the extension of the collective-bargaining agreement to Alessio's affiliates as it defines them, (1) it is calculated to cause Alessio to sever its ownership relationship with affiliated firms that seek to remain nonunion or to forebear from forming relationships with such firms,[9] even though those firms are separate employers under court-approved Board law, and (2) it is aimed not at preserving the work of Alessio's union-represented employees but rather at satisfying ''union objectives elsewhere,''[10] i.e., the objective of affecting the labor relations between the nonunion affiliated companies and their employees over which Alessio has no right of control. Such an attempt to impose a contract on separate employers of employees in ''work units far removed from the contractual unit'' is plainly secondary and is unlawful under Section 8(e), absent proviso protection. *Sheet Metal Workers Local 91 (Schebler Co.),* 294 NLRB 766, 770 (1989), enfd. in pertinent part 905 F.2d 417 (D.C. Cir. 1990).[11]

The judge implicitly conceded that the clause would be secondary if it was intended to force the extension of Alessio's collective-bargaining agreement with the Respondent to affiliates of Alessio whose only linkage

[5] On August 29, 1990, the Board reversed the judge's finding that certain of the employers in *Manganaro* were part of a multiemployer bargaining unit, vacated prior rulings quashing subpoenas served by the respondent and finding certain testimony not relevant to the issues in that case, and remanded the proceeding to allow the judge to receive evidence excluded by the Board's prior rulings and to make findings of fact and conclusions of law regarding the respondent's contention that the anti-dual-shop clause in that case had lawful primary objectives. See *Painters District Council 51 (Manganaro Corp.),* 299 NLRB 618 (1990), motions for reconsideration denied May 9, 1991 (unpublished order).

[6] *NLRB v. Longshoremen ILA,* 447 U.S. 490, 503–504 (1980), and cases there cited (criteria for falling within basic 8(e) prohibition); *Woelke & Romero Framing v. NLRB,* 456 U.S. 645, 652–660 (1982) (effect of proviso).

[7] *Chicago Truck Drivers (Signal Delivery),* 279 NLRB 904, 906 (1986).

[8] We note also that, although the Respondent's brief refers to the clause as ''a lawful work preservation clause,'' its brief mainly addresses the construction industry proviso, which comes into play only if a clause would otherwise violate Sec. 8(e).

[9] The cease-doing-business element of Sec. 8(e) is satisfied by proof of prohibitions against forming business relationships in the first place as well as requirements that one cease business relationships already in existence. See, e.g., *Ets-Hokin Corp.,* 154 NLRB 839, 840 (1965), enfd. 405 F.2d 159 (9th Cir. 1968), cert. denied 395 U.S. 921 (1969).

[10] *National Woodwork Mfrs. Assn. v. NLRB,* 386 U.S. 612, 643–645 (1967).

[11] Because it is aimed at affecting the labor relations of separate affiliated companies with their employees, the clause has an objective unlike the objective of the arbitral award secured by the union respondent in *Electrical Workers IBEW Local 46 (Puget Sound),* 303 NLRB 48 (1991). There, as the Board noted, the union's efforts were not focused ''on the labor relations between'' nonunion employer-members of the multiemployer association and their employees. Id.

was common ownership and performance of the same *type* of construction work within the Respondent Union's geographical jurisdiction. Companies that are bound *only* by common ownership are generally found to be neutrals with respect to each other's labor relations.[12] The judge managed to find a primary work preservation objective in the clause by construing it as if it would apply only to those double-breasted companies to which the signatory *diverted unit work*. Such an intent is not apparent from the text of the proposed clause, however. Because it does not require that the signatory employer control or manage the affiliates covered by the provision, it would reach companies performing work that was not within the signatory's ''right of control'' but rather had been independently obtained from clients that had never intended to give their business to Alessio. Furthermore the clause neither refers to diverted work nor requires that work performed by the employees of the nonunion affiliates be assigned to unit employees.

Finally, the Respondent has not presented evidence that Alessio had transferred jobs which it had obtained to the nonunion affiliates which would be covered by the provision, or that Alessio had changed its bidding practices so as to divert work from it to the nonunion affiliates, or that double-breasting in general diverts work from the union breast to the nonunion breast.[13] The judge's attempt to salvage the clause by resort to extrinsic evidence—the testimony of a business agent of the Respondent Union—is improper unless that evidence is aimed at resolving some ambiguity.[14] There is no ambiguous term in the clause on which the testimony sheds any light. The use of the phrases ''same or similar *type* of business enterprise'' and ''same or similar *classifications* of employees'' and the absence of any references to unit work make it clear that the clause is not limited in its application to companies that are performing work that was diverted from signatory employers.

In sum, considering the plain language of the proposed clause, we find that it clearly would apply on the basis of common ownership alone, and is not limited to cases in which common control[15] or diversion of work is demonstrated. Thus, the proposed clause would apply even in circumstances where the signatory employer did not have the power to assign the disputed work to unit employees. Indeed, the proposed clause does not seek and would not require the assignment to unit employees of any work performed by the nonunion ''breast.'' Rather, the anti-dual-shop clause is aimed at ensuring that the other ''breast's'' employees are covered by the agreement.

These factors also further demonstrate the secondary nature of the proposed clause. As the Supreme Court has noted, ''if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work.'' *NLRB v. Longshoremen ILA*, 447 U.S. 490, 504–505 (1980). For all the foregoing reasons, we find that the proposed anti-dual-shop clause falls within the general proscription of Section 8(e). We next turn to the Respondent's asserted defense based on the construction industry proviso to Section 8(e).

B. *The Construction Industry Proviso*

In enacting Section 8(e), Congress expressly provided that limited categories of secondary activity would be tolerated in certain industries. *Laborers Local 210 v. AGC*, 844 F.2d 69, 73 (2d Cir. 1988). Congress embodied that policy in the construction industry proviso to 8(e), which provides that

> nothing in this subsection [8(e)] shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

29 U.S.C. § 158(e). The Supreme Court has held that the proviso to Section 8(e) must be interpreted ''in light of the statutory setting and the circumstances surrounding its enactment.'' *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 628 (1975); *Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 653 (1982). Accordingly, we look beyond the literal language of the proviso to determine whether the union's proposed clause is protected.

After a thorough examination of court decisions that construe the proviso, we have determined that no case is dispositive of this issue. The Supreme Court has held that clauses cannot be protected by the proviso

[12] E.g., *Los Angeles Newspaper Guild Local 69 (Hearst Corp.)*, 185 NLRB 303 (1970), enfd. per curiam 443 F.2d 1173 (9th Cir. 1971), cert. denied 404 U.S. 1018 (1972).

[13] There is thus no evidence in this case like that which led the Board in *A-1 Fire Protection*, 273 NLRB 964 (1984), enfd. 789 F.2d 9 (D.C. Cir. l986), operating under the terms of a court remand that it accepted as law of the case, to find that the employer operating two enterprises as double-breasts had, by changes in his bidding practices, diverted major fire sprinkler installation jobs from his unionized operation to his nonunion operation, which had formerly done only inspection work and very small installation jobs. The Board also rested its work diversion conclusion on the judge's finding that market conditions could not account for the division of work between union and nonunion entities. Id. at 966–977.

[14] *Teamsters Local 982 (J. K. Barker Trucking)*, 181 NLRB 515, 517 (1970); *Ets-Hokin Corp*., supra, 154 NLRB at 841.

[15] In concluding that the proposed clause's common ownership provision is not limited to circumstances in which common control is also present, we rely on the fact that a showing that a signatory employer merely ''participate[s] in the formation of another company'' is sufficient to invoke application of the clause.

unless negotiated within the context of a collective-bargaining agreement. *Connell Construction v. Plumbers & Fitters*, 421 U.S. at 663. The proposed clause obviously would meet that requirement. Further, the Court, in *Woelke & Romero Framing v. NLRB*, 456 U.S. at 666, held that union signatory subcontracting clauses, if sought or negotiated in the context of a collective-bargaining agreement, are protected by the proviso.[16] The Court also held that there is no requirement that the signatory employer also perform work at a common jobsite with the nonsignatory employer in order for the union's contract to apply.[17] Id. The Union's clause in the instant case, however, is not strictly a subcontracting clause, but rather seeks to apply the contract to non-signatory entities that are related to the signatory employer by common ownership, and to which the signatory employer is not necessarily subcontracting work. Thus, unlike in *Woelke*, the union seeks to bind contractors related to one another on a horizontal, and not a vertical, basis.

In *Woelke*, the Court relied heavily on the fact that Congress intended to protect ''the pattern of bargaining'' in the industry in 1959 and the fact that union signatory subcontracting clauses were part of the existing pattern. Double-breasting was not an industry practice in 1959 and, as a result, anti-dual-shop clauses were not a part of the pattern of bargaining in the industry. Thus, Congress obviously had no opportunity to consider whether such clauses should be protected by the proviso.

In *Connell Construction*, the Court noted that Congress seemed to have adopted the proviso as a partial substitute for an attempt to overrule the Court's decision in *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951). *Connell*, 421 U.S. at 629. Congressional discussion in the legislative history focused on the problems of picketing a single nonunion subcontractor or a multiemployer building project and the close relationship between contractors and subcontractors at the jobsite. *Connell*, 421 U.S. at 629–630. The Court then stated (421 U.S. at 630):

> Congress limited the construction-industry proviso to that single situation, allowing subcontracting agreements only in relation to work done on a jobsite. In contrast to the latitude it provided in the garment-industry proviso, Congress did not afford construction unions an exemption from Sec. 8(b)(4)(B) or otherwise indicate that they were free to use subcontracting agreements as a broad organizational weapon.

A careful examination of the legislative history of the proviso reveals little affirmative evidence that Congress would have chosen to protect an anti-dual-shop clause if such a clause had existed in 1959. Section 8(e) represented a compromise between bills reported by the Senate and the House. The Senate bill (Kennedy-Ervin), which was aimed at correcting abuses by the Teamsters union, would have outlawed hot cargo agreements only in the trucking industry. 2 Leg. Hist. 1161–1162 (LMRDA 1959). The legislation proposed by the House in the Landrum-Griffin bill was much broader. It made it an unfair labor practice for any labor organization and any employer to enter into an agreement whereby the employer agrees to ''cease doing business with any other person.'' H.R. 8400, 86th Cong., 1st Sess. Sec. 705 (b)(1) (1959), reprinted in 2 Leg. Hist. 683 (LMRDA 1959). While the Conference Committee decided to adopt the House bill, the Senate Conferees insisted on a proviso that exempted hot cargo agreements in the garment industry, and also agreements relating to work to be done at the site of a construction project. 2 Leg. Hist. 1432 (LMRDA 1959). Because the provisos to 8(e) were new matter first proposed by the Senate conferees and not previously acted on by either the House or Senate, there is no detailed discussion in the legislative history explaining the reasons for insistence by the Senate conferees on the proviso.

However, as the Supreme Court pointed out in *Woelke & Romero*, the legislative history of the construction industry proviso indicates that Congress sought only to preserve the status quo and the pattern of collective bargaining in the construction industry at the time the legislation was passed. See also *Laborers Local 210 v. AGC*, 844 F.2d at 76.

The House Conference Report provides:

> The committee of conference *does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements*. Picketing to enforce such contracts would

[16] In this regard, the contract clause in *Woelke* is broader than the anti-dual-shop clause in this case, in that the *Woelke* clause was not limited to work similar to that performed by the signatory employer.

[17] The instant case is also distinguishable from *Plumbers Local 217 (Carvel Co.)*, 152 NLRB 1672 (1965), enfd. in pertinent part 361 F.2d 160 (1st Cir. 1966). The *Carvel* case involved a clause in which the employer agreed that no union member would be assigned to work on any job or project on which a worker or person is performing any work within the jurisdiction of the union under conditions different from those in the union's agreement. While the contract clause in *Carvel* had an indirect impact on employers not signatory to the union's contract (in that such a clause may put pressure on the general contractor to hire only union subcontractors), it did not seek to bind nonsignatory employers to the union contract directly. Unlike *Carvel*, the clause in the instant case would automatically apply the terms of the union's contract to nonsignatory employers that perform work of the same type as that covered under the union contract, if the signatory employer formed or participated in the formation of or shares common ownership with the nonsignatory company.

> be illegal under the *Sand Door* case (*Local 1796, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958)). *To the extent that such agreements are legal today under section 8(b)(4) of the National Labor Relations Act, as amended, the proviso would prevent such legality from being affected by section 8(e)*. The proviso applies only to section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). The *Denver Building Trades* case and the *Moore Drydock* cases would remain in full force and effect. The proviso is not intended to limit, change, or modify the present state of the law with respect to picketing at the site of a construction project. H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39, reprinted in 1 Leg. Hist. 943 (LMRDA 1959) [emphasis added].

Senator John F. Kennedy, who was chairman of the Conference Committee, explained that the Senate Conferees insisted upon an exemption from Section 8(e) for the clothing and apparel industries and for agreements relating to work to be done at the site of a construction project because ''[b]oth changes were necessary to avoid serious damage to the pattern of collective bargaining in these industries.'' 2 Leg. Hist. 1432 (LMRDA 1959).

Several other remarks in the legislative history indicate that Congress did not desire to change the law with respect to construction site subcontracting agreements. See 2 Leg. Hist. 1715 (remarks of Rep. Barden—''[t]his proviso is intended to permit what is now lawful''); 2 Leg. Hist. 1721 (remarks of Rep. Thompson—''both changes were necessary to avoid serious damage to the pattern of collective bargaining in these [construction and garment] industries'') 2 Leg Hist. 1823 (postenactment memorandum of Sen. Dirksen—''exempts from this [8(e)] provision . . . building industry contracts barring a firm from subcontracting work at its job site to an unorganized firm.'')[18]

On the other hand, Senator John F. Kennedy stated on behalf of the Senate Conferees that the proviso applied not only to ''promises not to subcontract work on a construction site to a nonunion contractor,'' which ''appear to be legal today,'' but also to ''all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them.'' 2 Leg Hist. 1433 (LMRDA 1959).

Contrary to our dissenting colleague, Senator Kennedy's remarks are ambiguous and do not support an expansive reading of the proviso. Senator Kennedy at first stated that ''[a]greements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today.'' He was obviously referring to a union signatory subcontracting clause, which was a common clause included in collective-bargaining agreements at the time the proviso was enacted. He then went on to state that ''[t]he proviso is also applicable to *all other agreements* involving undertakings not to do work on a construction project site with other contractors or subcontractors *regardless of the precise relation between them*.'' (Emphasis added.) This statement may refer to another type of clause, a no-side-by-side clause, which was also commonly included in collective-bargaining agreements in the 1950s.[19] These clauses prohibit the signatory employer from working on a jobsite where nonunion labor is present. When he used the phrase ''regardless of the precise relation between them,'' Senator Kennedy was likely referring to the fact that in a no-side-by-side clause, the signatory employer agrees not to work alongside a nonunion contractor, even if no contractual relationship exists between them. There is no basis for believing that Senator Kennedy intended to refer to relationships of the type covered by the clause at issue here.

We agree with the General Counsel's contention that the construction industry proviso should not be given an expansive reading.[20] The construction industry pro-

[18] As indicated by the legislative history, restrictive subcontracting clauses in collective-bargaining agreements that limited the ability of employers to deal with nonunion or nonsignatory subcontractors were common in the construction industry at the time of the passage of the Landrum-Griffin Act. See 2 Leg. Hist. 1433 (LMRDA 1959); Labor Management Reform Legislation: Hearing on S. 505, S. 748, S. 76, S. 1002, S. 1137, and S. 1311 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 86th Cong. 1st Sess. 752 (1959); Labor Management Reform Legislation: Hearing on H.R. 3540, H.R. 3302, H.R. 4473, and H.R. 4477 before a Joint Subcommittee of the House Committee on Education and Labor, 86th Cong., 1st Sess. 2363–2368 (1959). The purpose of such clauses was not only to avoid the unique jobsite friction that could exist when union and nonunion workers were employed on the same construction site, but also to recognize the ''close community of interests'' inherent in the construction industry, where the wages and working conditions of one set of employees could often affect those of another. *Laborers Local 210 v. AGC*, 844 F.2d at 69, 76 (2d Cir. 1988); *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859, 880–881 (D.C. Cir 1980), cert. denied. 451 U.S. 976 (1981). See also *National Woodwork Mfrs*., 386 U.S. at 638–639. These secondary agreements might take the form of union-signatory clauses, in which an employer agrees not to subcontract work to any party that is not signatory to a union contract, *Woelke & Romero Framing*, 456 U.S. at 649 fn. 1; or to clauses in which an employer agrees not to accept contracts from a nonunion contractor, *Laborers Local 210*, 844 F.2d at 71; or to clauses in which an employer agrees not to employ union workers side-by-side with workers performing work within the union's jurisdiction at nonunion standards, *Carvel*, supra.

[19] We note further that our dissenting colleague's reliance on *Carvel* is ill-founded in that the contract clause found protected by the proviso in *Carvel* was, in essence, a side-by-side clause much like those in existence prior to the enactment of Sec. 8(e) and its proviso.

[20] While we agree with the General Counsel's general contention that the legislative history does not support the Union's expansive reading of the construction proviso, we do not agree with all of the arguments he makes with respect to interpretations which should be given to various portions to the legislative history. Specifically, the

viso was enacted as an exception to Section 8(e)'s broad prohibition of secondary agreements. See 2 Leg. Hist. at 943, 966, 1429, and 1858 (LMRDA 1959); *Woelke & Romero Framing*, 456 U.S. at 653. It is a fundamental rule of statutory construction that ''where there is doubt concerning the extent of the application of the proviso on the scope of another provision's operation, the proviso is strictly construed,'' and ''only those subjects expressly exempted by the proviso should be freed from the operation of the statute.'' 2A *Sutherland Stat. Const*. Sec. 47.08 (4th Ed. 1984); Accord: *Citicorp Industrial Credit v. Brock*, 483 U.S. 27, 35 (1987).

We are unable to reach a definite conclusion that Congress would have included anti-dual-shop clauses within the proviso's protection. Therefore, we must ''strictly construe'' the proviso and find that the union's anti-dual-shop clause falls outside its protection. All of the discussions in the legislative history regarding the types of clauses existing at the time the legislation was drafted refer to the subcontracting of work either by a signatory employer to a nonunion operation, or to agreements by a signatory employer to refrain from requiring union employees to work on a jobsite with nonunion employees.[21] This exclusive focus on then-current practices is a reflection of Congress's intent, manifested in the proviso, merely to maintain the legality of those practices.[22]

Moreover, the clauses existing in 1959 discussed in the legislative history had a ''cease doing business'' objective with respect to contractors in a vertical relationship with each other on a common jobsite, whereas the union's anti-dual-shop clause in the present case seeks to bind entities in a horizontal relationship to each other, even in situations where the signatory and nonsignatory employers do not have workers employed on a common jobsite. We see little to indicate that Congress intended that the construction industry proviso be used to protect a clause such as the one here, which differs substantially from those in existence at the time the proviso was enacted. Accordingly, we find that the Union's anti-dual-shop clause is not protected by the construction industry proviso to Section 8(e).

C. *Failure to Bargain in Good Faith*

As previously noted, the judge found that, since August 21, 1985, the Union has demanded that Alessio agree to the anti-dual-shop clause as a condition of any agreement and thus had insisted to impasse over its inclusion in any successor to the parties' 1982–1985 agreement.[23] It is well-settled that a party may not insist to impasse on agreement with respect to matters which are not mandatory subjects of bargaining. See *NLRB v. Borg-Warner Corp*., 356 U.S. 342 (1958). Having determined that agreement to the proposed clause would be prohibited by Section 8(e) and not protected by the construction industry proviso, we find that the Respondent violated Section 8(b)(3) by insisting that Alessio agree to the clause as a condition of reaching an agreement.

REMEDY

Having found that the Respondent violated Section 8(b)(3) of the Act, we shall order it to cease and desist, to bargain on request with Alessio without insisting that Alessio agree to the anti-dual-shop clause, and,

---

General Counsel refers to language contained in Senate Resolution 181 and argues that Congress rejected attempts to amend Sec. 8(b)(4)(B) to exempt from its prohibitions ''persons in the relation of . . . joint venturers or contractors and subcontractors,'' 2 Leg. Hist. 1383, and that Congress rejected attempts to provide that Sec. 8(e) prohibitions would not apply where two employers are ''under the same ownership and control.'' 2 Leg. Hist. 1383. We do not place any reliance on the language of Senate Resolution 181, since it was never voted on by the Senate, even though it appears that Senator Kennedy, who was Chairman of the Conference Committee, may have presented the proposals to the Conference Committee for its consideration. See 2 Leg. Hist. 1434. The General Counsel also alleges that Congress rejected attempts to provide that 8(e) prohibitions would not apply to ''businesses doing business with one another when one is owned or controlled by the other or is owned or controlled substantially in common.'' See 2 Leg. Hist. 1425. This language was taken from an amendment proposed by Sen. Morse to Sec. 8(b)(4)(B), not to Sec. 8(e). Thus, the fact that the proposals offered by Sen. Morse were not accepted by the Senate conferees does not support the contention that the proviso does not apply to two businesses commonly owned or controlled. Moreover, Sen. Morse's proposals were never formally offered as an amendment and were never voted upon by the Senate. See 2 Leg. His. 1400–1431.

With respect to the remarks made by Rep. Barden before the House that the proviso ''deals only with situations where there is a contractor or subcontractor relationship and not to situations where there is no privity of contract between two or more contractors on a particular site,'' 2 Leg. Hist. 1715, we find that these remarks are so ambiguous that they do not offer any insight into the legislative intent behind the proviso.

[21] In addition to the references cited above, we note that Senator Dirksen described the construction industry proviso as exempting ''building industry contracts barring a firm from subcontracting work at *its* jobsite to an unorganized firm.'' (Emphasis added.) 2 Leg. Hist. 1829.

[22] In sharp contrast to the proviso's narrow focus, we note that Sec. 8(e)'s more general cease-doing-business prohibition refers to ''any contract or agreement, express or implied.'' The broader reach of this language has been acknowledged by the Board in the following terms:

> Probably no language can be explicit enough to reach in advance every possible subterfuge of resourceful parties. Nevertheless, we believe that in using the term ''implied'' in Section 8(e) Congress meant to reach every device which, fairly considered, is tantamount to an agreement that the contracting employer will not handle the products of another employer or cease doing business with another person.

Amalgamated Lithographers of America (Miami Post Co.), 130 NLRB 968, 976 (1961), mod. on other grounds 301 F.2d 20 (5th Cir. 1962).

[23] We note that the Union has not excepted to the judge's findings in this regard.

if an understanding is reached, to embody the understanding in a signed agreement.

ORDER

The National Labor Relations Board orders that the Northeast Ohio District Council of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Ernest Alessio Construction Company, Inc. by insisting to impasse to secure its proposed anti-dual-shop clause.

(b) In any like or related manner failing or refusing to bargain in good faith with Ernest Alessio Construction Company, Inc. concerning wages, hours, or other terms and conditions of employment for employees in the appropriate bargaining unit.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively in good faith with the above-named Employer as the exclusive representative of the employees in the unit herein found appropriate, and embody in a signed agreement any understanding reached.

(b) Post at its business offices and meeting halls copies of the attached notice marked ''Appendix.''[24] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members of the Respondent are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The Respondent shall also sign and return to the Regional Director sufficient copies of the notice for posting by Ernest Alessio Construction Company, Inc., if willing, at all places where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER DEVANEY, concurring in part and dissenting in part.

I agree with my colleagues that the anti-dual-shop clause violates Section 8(e) of the Act, inasmuch as the record in this case does not establish that the clause had as its objective preservation of bargaining unit work and no other primary objective has been suggested.[1] However, the construction industry proviso to Section 8(e) protects agreements between labor organizations and construction industry employers ''relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.'' 29 U.S.C. § 158(e). I would find that the anti-dual-shop clause is such an agreement and therefore is not unlawful.

The anti-dual-shop clause falls within the literal terms of the proviso. In effect, the clause prohibits a signatory employer from maintaining common ownership or affiliation with an entity performing on a nonunion basis work similar to that performed under its collective-bargaining agreement using employees similar to those covered by the agreement.[2] As such, the clause relates to the contracts and subcontracts the nonunion ''breast'' will enter into by requiring that they be performed under the terms and conditions of employment specified in the agreement.

In this regard, I find no merit to the General Counsel's contention that the proviso must be limited in its application to agreements which relate to the signatory employer's contracting and subcontracting practices or else the phrase ''relating to the contracting or subcontracting of work'' would be superfluous. To the contrary, the legislative history of the proviso reveals that this phrase was included for the purpose of excluding from the proviso's protection boycotts of

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] An anti-dual-shop clause is a clause which seeks to protect the employees in a bargaining unit from the effects of double-breasting, a phenomenon which has swept through the construction and trucking industries, among others. Double-breasting generally refers to a union employer's acquisition, formation, or maintenance of a separate nonunion company which performs the same type of work covered by its union agreement, often in the same geographic area.

In finding that the anti-dual-shop clause at issue in this case has a secondary objective, I rely particularly on the fact that the clause would only be satisfied if a signatory employer's ''affiliates'' signed a collective-bargaining agreement with the Union. The Board has previously recognized that such ''union signatory'' requirements are a clear indicia of a secondary objective, particulary because any primary objective such as the maintenance of union standards, may be satisfied by a less-restrictive ''union standards'' clause. See, e.g., *Chemical Workers Local 6-18 (Wisconsin Gas)*, 290 NLRB 1155 (1988).

[2] The anti-dual-shop clause does not expressly state that it applies only to work performed at a construction jobsite. However, express language of this type is not required to satisfy the proviso's requirements. See, e.g., *Laborers Local 210 v. AGC*, 844 F.2d 69 (2d Cir. 1988). Moreover, it appears from the record that all work performed under the agreement would take place at a construction site and none of the parties have argued that this is not the case. I also disagree with my colleagues' assertion that the clause would ''extend the contract between Respondent and a signatory employer'' to a nonunion ''breast.'' To the extent that the nonunion entity is not an alter ego of the signatory employer, it cannot, of course, be bound by the signatory employer's agreements. At most, the anti-dual-shop clause would subject the signatory employer to liability in the event its provisions were breached. See, e.g., *Teamsters Local 216 v. Granite Rock Co.*, 851 F.2d 1190 (9th Cir. 1988).

goods used at the jobsite or boycotts of nonjobsite suppliers.[3] Thus, there is no evidence that Congress wished to limit the proviso to agreements regarding the signatory employer's contracting and subcontracting and every reason to believe that the restrictive language in the proviso cited by the General Counsel addresses an entirely different concern. Under these circumstances, I am persuaded that the proviso, by its terms, is broad enough to encompass agreements—like the anti-dual-shop clause—which regulate the contracting and subcontracting of entities other than the signatory employer.

Although my colleagues are correct that no case directly addresses this issue, the rationale and holdings of several decisions indicates that the proviso may be read to encompass agreements like the anti-dual-shop clause. In this regard, the Board has previously stated that the proviso applies to agreements regarding contracting or subcontracting of work by an employer other than the employer with whom the union has an agreement. *Plumbers Local 217 (Carvel Co.)*, 152 NLRB 1672 (1965), enfd. in pertinent part 361 F.2d 160 (1st Cir. 1966). See also *Hod Carriers District Council of Southern California (Swimming Pool Gunite)*, 158 NLRB 303, 307 fn. 14 (1966) (vacating earlier holding that clause allowing employees to cease working on project declared ''unfair'' outside proviso because not related to contracting or subcontracting).

In *Carvel Co.*, the Board approved an agreement which precluded the employer from assigning unit employees to any job on which other workers performed work within the union's jurisdiction under employment conditions different from those in the parties' collective-bargaining agreement. In finding this agreement lawful, the Board expressly noted that ''[t]he language of the proviso itself does not limit its applicability to the 'contracting out' or 'subcontracting' of work by the employer with whom the union has an agreement within the scope of Section 8(e).'' Id. at 1676.[4] Thus, the Board held that the application of the proviso does not depend on the precise relations between the signatory employer and those other employers and persons who may be affected by enforcement of the challenged agreement. Id.[5]

Our decisions in *Carvel* and *Swimming Pool Gunite* thus recognize that the proviso is not limited in its application to agreements which address the signatory employer's contracting or subcontracting practices. I see no reason to depart from our precedents in this area, and would therefore find that the anti-dual-shop clause—which addresses the contracting and subcontracting practices of the nonunion side of a double-breasted construction employer—is protected by the proviso as well.[6]

This interpretation of the proviso is consistent both with prior Board decisions and with key provisions of the legislative history. As my colleagues note, Senator John F. Kennedy, the chairman of the conference committee on the Labor Management Reporting and Disclosure Act of 1959, stated that the proviso is applicable both to ''promises not to subcontract work to a nonunion contractor'' and to ''all other agreements involving understandings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them.'' 2 Leg. Hist. 1433 (LMRDA). Contrary to my colleagues, I think that this statement does not refer only to undertakings by a signatory employer not to do work on a jobsite where nonunion labor is present. Rather, the broad language employed by Senator Kennedy indicates to me that the proviso protects agreements regardless of the ''precise relationship'' between the signatory employer and the employer whose contracting or subcontracting are addressed by the agreement.

Even if my colleagues are correct, however, an undertaking not to do work on a jobsite where nonunion labor is present functions primarily as a restraint on the contracting and subcontracting practices of employers other than the signatory. It is true that such undertakings prevent a signatory employer from accepting a

[3] Senator Kennedy, on behalf of the Senate conferees for the bill that became the Labor Management Reporting and Disclosure Act, stated that

> it should be particularly noted that the proviso relates only to the ''contracting or subcontracting of work to be done at the site of the construction.'' The proviso does not cover boycotts of goods manufactured at an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite.

2 Leg. Hist. 1433.

[4] As the Board noted in *Carvel*,

> were the proviso given such a limited applicability, it would be of little effect, for aside from the general contractor on a job, the various firms involved normally have control only of ''unit'' work that is, the particular work for which they hold a subcontract. Restrictions on the right to subcontract such work could well be primary, and thus lawful without regard to the construction industry proviso.

152 NLRB at 1676.

[5] I find unpersuasive my colleagues' efforts to distinguish *Carvel*. My colleagues assert that the anti-dual-shop clause would automatically apply the terms of the union's contract to nonsignatory employers, while the clause in *Carvel* did not. As I have previously shown, however, the instant clause does not and cannot bind an employer which has not agreed to be bound by it. Rather, like the clause in *Carvel*, the anti-dual-shop clause prohibits signatory employers from ''doing business'' with employers who are not covered by a contract with the union. In *Carvel*, the prohibited business relationship was to work on specified jobsites. Under the instant clause, the prescribed business relationship is acquisition of ownership or control of a nonunion ''breast.''

[6] Although the agreements at issue in *Carvel* and *Swimming Pool Gunite* applied to jobsites at which the signatory employer's employees were present, while the anti-dual-shop clause applies to the nonunion breast's contracts and subcontracts at all jobsites, it is well settled that the proviso protects agreements which apply to jobsites at which no union members are employed. *Woelke & Romero Framing v. NLRB*, 456 U.S. 645 (1982).

contract if nonunion labor is present at the jobsite at the time. However, the undertaking would also be violated if, for example, the general contractor subsequently replaced one of the other subcontractors with a nonunion firm—an action that has nothing to do with the signatory employer's contracting and subcontracting practices. Under these circumstances, the undertaking is only concerned with the general contractor's subcontracting practices and is thus functionally indistinguishable from the anti-dual-shop clause.[7] In light of my colleagues' apparent concession that such undertakings are lawful, I can see no reason why the proviso should not be interpreted to protect the anti-dual-shop clause as well.

Finally, construing the proviso to protect the anti-dual-shop clause is consistent with the Congressional concerns which led to the proviso's inclusion in Section 8(e). Congress adopted the proviso

> not only to avoid the unique jobsite friction that could exist when union and nonunion workers were employed on the same construction site, but also to recognize the ''close community of interests'' inherent in the construction industry, where the wages and working conditions of one set of employees could often affect those of another.

AGC, supra, 844 F.2d at 76. As the Supreme Court recognized in *Woelke & Romero*, ''Congress concluded that the community of interests on the construction jobsite justified the top-down organizational consequences that might attend the protection [by the proviso] of'' otherwise unlawful secondary agreements. 456 U.S. at 663. For the same reason, the proviso protects agreements which exert ''bottom-up'' organizational pressures, such as agreements not to subcontract work from a nonunion employer. *AGC*, supra. In my view, double-breasting is at least as significant a threat to the ''close community of interests'' in the construction industry as the subcontracting practices at issue in *AGC*, and agreements which address that threat should therefore also be protected by the proviso.[8]

In this regard, I cannot agree with my colleagues' assertion that the anti-dual-shop clause is not protected by the proviso because it exerts secondary pressures ''horizontally'' rather than ''vertically.'' Attempts to distinguish between clauses with ''top-down'' and ''bottom-up'' organizational pressures have previously been rejected by the courts, and my colleagues do not state why their novel horizontal-vertical distinction is entitled to greater deference. As the Second Circuit noted in *AGC*, supra,

> the potential anti-democratic effect of such a clause on workers, however, is no different than that created by the more typical clause discussed in *Woelke*; it still tends to create a pressure that will emanate from management downward within the structure of any given employer.

844 F.2d at 76. For all of the foregoing reasons, I would find that the Union's anti-dual-shop clause is protected by the construction industry proviso to Section 8(e).

Failure to Bargain in Good Faith

I would also find that the Union did not violate Section 8(b)(3) of the Act by insisting to impasse on agreement with respect to the anti-dual-shop clause. The General Counsel argues that the Union was not privileged to bargain to impasse over the clause because it has purely secondary objectives and thus does not relate to the wages, hours, and working conditions of unit employees. We have previously rejected this contention. *Hod Carriers District Council of Southern California (Swimming Pool Gunite)*, 158 NLRB 303, 305–306 (1966). As we noted in *Hod Carriers Local 1082 (E. L. Boggs Plastering Co.)*, 150 NLRB 158, 165 (1964), the Union has the right, pursuant to Section 8(b)(4)(A), to strike to obtain an agreement protected by the proviso, and ''[i]t would be anomalous to hold in the instant circumstances that this right was taken away under Section 8(b)(3).'' I would therefore dismiss the complaint.[9]

[7] Of course, a union may not resort to means of enforcement prohibited by Sec. 8(e) in the event an undertaking of this type is violated.

[8] See Befort, Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation, 1987 U. Wisc. L. Rev. 67 (1987); *D'Amico v. Painters District Council 51*, 120 LRRM 3473, 3474–3475 (D.Md. 1985).

[9] If necessary to resolve the case, I would also find that the proposed anti-dual-shop clause ''vitally affects'' unit employees in that it would protect their employment standards from competition from below-contract wages, and, as such, was a mandatory subject of bargaining over which the Union could lawfully bargain to impasse. See *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 179 (1971).

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL not refuse to bargain in good faith with Ernest Alessio Construction Company Inc. (Alessio) by insisting to impasse, as a condition of agreement, that it agree to the proposal that the agreement apply to other employers, in which it has a direct or indirect

ownership interest, which engage in the same or similar line of business using the same or similar classifications of employees within the jurisdiction of this Union.

WE WILL, on request, bargain collectively in good faith with Alessio as the exclusive collective-bargaining representative of the employees in the appropriate unit and embody in a signed agreement any understanding reached.

NORTHERN OHIO DISTRICT COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL–CIO

Mark Carissimi, Esq., for the General Counsel.
Stephen A. Markus, Esq. (Ulmer & Berne), of Cleveland, Ohio, for the Respondent.
Dean E. Westman, Esq. (Buckingham, Doolittle & Burroughs), of Akron, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. This case was tried in Akron, Ohio, on November 8, 1988. The charge was filed February 6, 1986, and the complaint was issued April 30, 1986.

The primary issue is whether the Union (the Respondent),[1] unlawfully bargained to impasse over a dual-shop clause in violation of Section 8(b)(3) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, is a general contractor in the construction industry in Akron, Ohio, where it annually ships goods valued over $50,000 directly outside the State. I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5).

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Proposed Dual-Shop Clause*

Faced with a growing problem of nonunion competition (Tr. 104), the Union in 1984 proposed (G.C. Exhs. 4, 5) a market recovery program for private sector work and an addendum to the 1982–1985 Carpenter's agreement with the Akron division of the Associated Contractors of Ohio, Inc. The addendum would extend this master agreement to May 11, 1987, and freeze the wage increases scheduled for June 1 and December 1, 1984.

The proposed ''Operation Turnaround/Market Recovery'' agreement would permit the payment of 80 percent of the wage rate on certain jobs and add a dual-shop clause as the second paragraph to the subcontractor clause (art. 14, p. 9) in the 1982–1985 master agreement. The amended subcontractor clause read (G.C. Exh. 5. art. 5):

> (1) This Agreement shall bind all subcontractors while working for a contractor on the jobsite upon whom this Agreement is binding. Any contractor who sublets any of his work must sublet same, subject to this Agreement.
>
> (2) *In the event that the partners, stockholders or beneficial owners of the company form or participate in the formation of another company which engages or will engage in the same or similar type of business enterprise in the jurisdiction of this Union and employs or will employ the same or similar classifications of employees covered by this Collective Bargaining Agreement, then that business enterprise shall be manned in accordance with the referral provisions herein and covered by all the terms of this contract*. [Added paragraph emphasized.]

The Company, which withdrew from the employer association in the mid-1970s (Tr. 11), had signed the 1982–1985 master agreement with minor changes. It sought the wage reduction, but refused to join other contractors in agreeing to the dual-shop clause (Tr. 138). It had never been affiliated with a nonunion construction company (Tr. 12).

On June 10, 1985, during separate negotiations after the May 31 expiration of the Company's 1982–1985 agreement with the Union, President Lino Alessio wrote the Union proposing further concessions ''for our firm to be competitive and remain in business'' (G.C. Exh. 10). These proposals included a reduction in the journeyman wage rate on all except prevailing wage jobs to $12 an hour including fringe benefit payments, a reduction of over 35 percent.

On August 6, 1985, Alessio again wrote the Union, pointing out that ''we have met four times regarding negotiating a new labor agreement'' and adding (G.C. Exh. 11):

> I stated that I could not sign an agreement containing a subcontractor's clause (which I personally feel is not legal or a mandatory bargaining item), nor the Market Recovery Agreement without adjustment in Articles I, II, omission of V, omission of VII—Para. 6, and X.

Alessio was refusing to sign an agreement that included not only paragraph 2 of article 5, the dual-shop clause that the General Counsel contends is illegal, but also paragraph 1, which the General Counsel concedes is legal (Tr. 46). Alessio listed as well other provisions to which he objected.

Notes of the August 21, 1985 meeting (R. Exh. 10, p. 1) indicate that the company counsel told the Union: ''We do not want any subcontracting clause'' because the Company wants ''to be free to use whomever we want to, whenever we want to'' and the Company ''will employ nonunion if so desire.''

[1] The parties have stipulated (G.C. Exh. 2) that by merger effective March 1, 1988, the Northeast Ohio District Council of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO became the successor of Respondent Summit, Medina and Portage Counties District Council.

The complaint alleges that since August 21, 1985, the Union has ''demanded as a condition of consummating any collective-bargaining agreement that [the Company] agree to include'' paragraph 2 of article 5, which is ''prohibited by Section 8(e) of the Act'' and ''is not a provision regarding terms and conditions of employment'' of unit employees.

B. *Bargaining Impasse over Dual-Shop Clause*

The General Counsel contends that the Company and Union were at an impasse over the dual-shop clause.

The Union contends that ''the impasse in negotiations was *not* caused by the Union's insistence'' on this paragraph 2 of article 5. ''As [the Company itself admitted, it was unwilling to enter into *any* agreement with the Union that contained any subcontractor clause—even the admittedly lawful'' paragraph 1 (Tr. 73, 76–77) and an impasse was reached on other proposals as well.

In rejoinder the General Counsel contends: ''Suffice it to say that there is undisputed evidence that [the Company] objected to both paragraphs specifically and that the Union never withdrew the second paragraph from its proposal.''

I agree with the General Counsel that since August 21, 1985, the Union has demanded the inclusion of the paragraph 2 dual-shop clause as a condition for consummating an agreement with the Company. Although the Union permitted other contractors to sign the 1982–1987 Carpenter's agreement (G.C. Exh. 15) and later the 1987–1990 Carpenter's agreement (R. Exh. 11) without signing the market recovery agreement, those contractors (listed in R. Exhs. 7, 8) were willing to pay the full wage rates on all jobs. The Company, on the other hand, was insisting on a reduced wage rate on certain jobs (Tr. 27, 145).

It is well established, as the General Counsel points out (at 9): ''The fact that the parties were at impasse over other issues that were mandatory subjects is immaterial in finding that the Act has been violated by bargaining to impasse over a nonmandatory subject. '' The Supreme Court held in *NLRB v. Borg-Warner Corp*., 356 U.S. 342, 346–347 (1958), which involved ''ballot'' and ''recognition'' clauses that were not mandatory subjects of bargaining:

> From the time that the company first proposed these clauses, the employees' representatives . . . made it clear that each was wholly unacceptable. The Company's representative made it equally clear that no agreement would be entered into by it unless the agreement contained both clauses. In view of this impasse, there was little further discussion of the clauses, although the parties continued to bargain as to other matters.

The Court upheld the Board's finding that the employer violated Section 8(a)(5) by insisting on the clauses ''as a condition precedent to accepting any collective-bargaining contract.''

Similarly here, the Company made it clear, from the time the Union first proposed the dual-shop clause, that the clause was unacceptable. The Union made it equally clear that its demand for the clause was a condition for signing an agreement containing a wage concession that the Company required. Moreover, in a Motion for Summary Judgment submitted to the Board on January 15, 1987 (G.C. Exh. 1(n), pp. 6–7), the Union admitted that it ''has demanded as a condition of consummating any collective-bargaining agreement with [the Company] that the [Company] agree to include the work-preservation [dual-shop] clause in such agreement.''

I find that the Company and the Union reached an impasse over the inclusion of the proposed dual-shop clause, which the General Counsel contends is an unlawful secondary clause that violates Section 8(e) and a nonmandatory subject of bargaining.

C. *Is Clause Prohibited by Section 8(e)?*

1. Primary or secondary clause

Section 8(e) makes it an unfair labor practice for a union and an employer ''to enter into any . . . agreement, express or implied, whereby such employer . . . agrees to . . . cease doing business with any other person.'' The construction industry proviso exempts, an agreement between a union and ''an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction.''

It is well established that the 8(e) prohibition and the construction industry proviso apply only to clauses that are secondary in nature. As found by the Supreme Court in *NLRB v. Plumbers Local 638 (Austin Co.)*, 429 U.S. 507, 517 (1977): ''Section 8(e) does not prohibit agreements made for 'primary' purposes, including the purpose of preserving for the contracting employees themselves work traditionally done by them.''

The General Counsel contends that the dual-shop clause is secondary, not primary. Citing *Austin Co.*, the General Counsel points out that ''The Court noted that a lawful work-preservation agreement must pass two tests: (1) the objective of the agreement must be preservation of work for members of the unit rather than some secondary goal, and (2) the 'right of control' test . . . must be satisfied.'' The General Counsel then argues:

> The concept of primary work preservation, as an object not outlawed by Section 8(e), is defined in terms of preserving the work of employees (the unit) of the employer who is obligated to bargain with the union as the representative of such employees. In order for a contract provision to constitute lawful work preservation, the clause must seek to protect the work of a particular bargaining unit against actions or decision by the employer of such unit. That employer must control the work to be preserved and the clause must be addressed at regulating such control.
>
> The [dual-shop clause] has a clear secondary thrust for it does not bar *the diversion* or assignment *of work which would otherwise be performed by the employees of the [Company]*. Rather, the disputed clause allows such work to be performed by an entity in which the ''partners, stockholders or beneficial owners'' of a signatory employer formed or participated in the formation. The clause thus allows unit work to be performed by the employees of separate employers and accordingly is a secondary clause. [Emphasis added.]

I note that the General Counsel, by making this argument, is conceding that the dual-shop clause relates to ''the divi-

sion . . . of work which would otherwise be performed by [bargaining unit] employees.''

The Union contends that the dual-shop clause is a work-preservation clause that is primary, not secondary, and therefore outside the proscription Section 8(e).

According to the Union, ''The Work Preservation Clause was designed . . . to preserve for union members the work that had been traditionally performed'' by them and to prevent diversion of the work to the nonunion ''breast'' of a double-breasted operation. ''Moreover, [the Union] intended that the clause would not apply unless there was control by the signatory employer over the work of the nonunion company.'' (Business Agent Steven Kasarnich credibly testified (Tr. 126) that ''we were asked by more than one contractor what our intentions were'' in proposing the clause, and the Union explained that it would apply to ''a company which controlled or formed another operation with intent to divert our work.'')

Thus the Union contends that the dual-shop clause would apply *if the company* (''in the event that the partners, stockholders or beneficial of the company'') *forms a similar construction company in the same area* (''form or participate in the formation of another company which engages or will engage in the same or similar type of business enterprise in the jurisdiction of this Union'') *and employs employees doing the same type of work* (''and employs or will employ the same or similar classifications of employees covered by this Collective Bargaining Agreement''), ''then that business enterprise shall be manned in accordance with the referral provisions herein and covered by all the terms of this contract.''

The Union was willing to, and did, sign the new master agreement with other union contractors without demanding the dual-shop clause. Yet, the Union was demanding that the Company agree to the dual-shop clause as a condition for entering into a new agreement. As President Alessio credibly testified (Tr. 71), the Company was never offered the master agreement without the market recovery agreement (which contained the dual-shop clause in art. 5, par 2).

The Company was refusing to agree not only to this dual-shop clause, but also to the subcontracting clause in the master agreement. Although it had been a union contractor for many years, it was stating (through its attorney) that it ''wanted to be free to use whomever we want to, whenever we want to'' and that it ''will employ nonunion (employees) if so desire,'' as found above.

Under these circumstances I find that the Union's primary purpose in demanding that the Company agree to the dual-shop clause was to prevent the Company from forming, and diverting union work to, a nonunion company rather than assigning work at the reduced wage rate to union employees in the bargaining unit. The Union was obviously demanding the dual-shop clause to prevent the Company from evading the paragraph 1 subcontractor clause (which limited subletting to union companies) by forming a nonunion company to perform work previously assigned to bargaining unit employees. The clause would require the Company's newly formed affiliate to abide by the union contract, preserving the bargaining unit work and preventing the affiliate from diverting the work to a nonunion operation.

I therefore agree with the Union that the dual-shop clause ''is a lawful work preservation clause over which the Union may bargain to the point of impasse.''

2. The construction industry proviso

Even assuming that the dual-shop clause was secondary in nature (being an agreement for the Company to ''cease doing business'' with a newly formed separate enterprise within the proscription of Section 8(e) and not a work-preservation clause), I would find that the clause satisfies the requirements for exemption under the construction industry proviso to Section 8(e).

The clause would be an agreement between the Union and ''an employee in the construction industry'' and would relate to ''the contracting or subcontracting of work'' to or by a similar construction company doing similar jobsite work ''at the site of the construction.'' It is well established, as held in *Plumbers Local 217 (Carvel Co.)*, 152 NLRB 1672, 1676–1677 (1965), that the proviso is not inapplicable because ''the contract provision does not specifically refer to the 'contracting out' or 'subcontracting' of unit work,'' or because the provision ''may affect persons and employers with whom [the primary employer] has no contractual relationship.''

In *Carvel* the employer agreed that no union member would be required to work on any project on which a person working under different conditions of employment would perform work within the union's jurisdiction. The Board held that the clause was secondary and therefore within the general prohibition of Section 8(e), but that the clause would have been protected by the construction industry proviso except for the self-enforcement provisions. The Board has repeatedly held that ''Contractual provisions which authorize a union to employ economic 'self help' to enforce secondary subcontracting clauses are not authorized by the proviso to Section 8(e).'' *Associated General Contractors*, 280 NLRB 698, 703 (1986). Here, the General Counsel does not contend that the Union was demanding any self-help provision to enforce the dual-shop clause.

The General Counsel argues that the dual-shop clause falls outside the construction industry proviso because the clause ''applies to jobsites where neither the signatory employer [the Company] nor its possible subcontractor [under the paragraph 1 subcontractor clause] would be present but, rather, only the nonsignatory affiliated company [formed by the Company's ''partners, stockholders or beneficial owners'']. The proviso may apply, however, when employees of the union contractor or subcontractor are not present on jobsites with nonunion workers. The Supreme Court so ruled in *Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 649, 666 (1982), which involves the application of the proviso to a union signatory subcontracting clause in which the employer agreed ''that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction . . . except to a person . . . party to [the appropriate union agreement].'' The Court specifically ruled:

> We hold that the construction industry proviso to Section 8(e) of the National Labor Relations Act ordinarily shelters union signatory subcontracting clauses that are sought or negotiated in the context of a collective-bargaining relationship, even when *not limited in application to particular jobsites at which both union and nonunion workers are employed*. [Emphasis added.]

More recently in *Operating Engineers Local 701 (Lease Co.)*, 276 NLRB 597, 600–602 (1985), the Board held that ''even clauses which are secondary in nature, i.e., intended *to affect the employment practices of other . . . employers not party to the contract* (emphasis added), and which are within the general proscription of Section 8(e) may be lawful and protected if they satisfy the requirements for exemption under the construction industry proviso to Section 8(e).'' Finding the owner-operator clause to be secondary (the union not seeking ''to preserve for employees in the bargaining unit work which they have traditionally done or to recapture or reclaim for unit employees work which they have previously performed or which otherwise constitutes 'fairly claimable' work''), the Board held the proviso would be applicable except for the self-enforcement features in the clause. ''Such secondary clauses can be enforced only through recourse to judicial proceedings.''

D. *Concluding Findings*

The complaint alleges that the Union refused to bargain in good faith by demanding since August 21, 1985, as condition for consummating any collective-bargaining agreement, that the Company agree to the dual-shop clause that is prohibited by Section 8(e) and not a provision regarding terms and conditions of employment of bargaining unit employees.

As found, the Company and the Union did reach an impasse over the Union's demand that the dual-shop clause be included in any agreement with the Company.

I have found, however, that the dual-shop clause is not secondary, but is a primary work-preservation clause. Therefore, I agree with the Union that the clause is outside the proscription of Section 8(e). In the alternative I have found that even assuming that the dual-shop clause were secondary in nature, the clause would be protected by the construction industry proviso to Section 8(e). I therefore find that the clause is not prohibited by Section 8(e).

Having found the dual-shop clause to be lawful, I reject the allegation that the Union unlawfully demanded a clause prohibited by Section 8(e). I also reject the allegation that the dual-shop clause does not relate to the unit employees' terms and conditions of employment. As a lawful work presentation clause, it does relate to the employees' terms and conditions of employment.

Moreover, even if the clause were secondary in nature, the Board has repeatedly held that a union doesn't violate Section 8(b)(4)(A) by ''picketing to obtain a contract clause which is within the construction industry proviso to Section 8(e).'' *Northeastern Indiana Trades Council (Centlivre Village*), 148 NLRB 854, 856 (1964); *Carpenters Local 944 (Woelke & Romero)*, 239 NLRB 241, 247–248 (1978). A fortiori, if a union may lawfully picket for a secondary clause protected by the construction industry proviso, it may lawfully demand the clause in bargaining. As the Board found in *Laborers Local 1082 (Boggs Plastering)*, 150 NLRB 158, 165 (1964): ''[B]y virtue of the construction proviso to Section 8(e) Congress intended to permit unions in this industry to strike for [clauses protected by the proviso]. It would be anomalous to hold . . . that this right was taken away under Section 8(b)(3).''

I therefore find that the Union lawfully demanded the dual-shop clause.

CONCLUSION OF LAW

The Union did not unlawfully refuse to bargain in violation of Section 8(b)(3) by demanding that the dual-shop clause be included in the agreement with the Company.

[Recommended Order for dismissal omitted from publication.]